90-1864

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

NEW YORK STATE DEPARTMENT OF HEALTH,

Petitioner,

against

JOANNA ANDRULONIS, Individually and as Conservator of the Property of JEROME ANDRULONIS; UNITED STATES OF AMERICA; GLATT AIR TECHNIQUES, INC.; GLATT GmbH; WISCONSIN ALUMNI RESEARCH FOUNDATION, INC.; WARF INSTITUTE, INC.; RALTECH SCIENTIFIC SERVICES, INC.; RALSTON PURINA COMPANY; ELI LILLY AND COMPANY; and JOHN L. THOMPSON AND SONS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 31, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(1064A—LC3-630)

Question Presented.

Whether, in view of the conflict between the decision below in this case and this Court's ruling in *Gaubert* and a number of circuit court decisions, certiorari should be granted to determine whether the discretionary function exception to the Federal Tort Claims Act bars a claim, the gravamen of which in this case is that a Federal Government scientist with authority and discretion to cooperate with local government scientists negligently failed to assess the risks of an experiment and failed fully to warn other knowledgeable scientists of safety hazards?

Parties.

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

1. Joanna Andrulonis, Individually and as Conservator of the Property of Jerome Andrulonis, Plaintiff;

2. The United States, Defendant and Third-Party Plaintiff;

3. The New York State Department of Health ("NYSDOH"), the Third-Party Defendant; and

4. Glatt Air Techniques, Inc.; Glatt GmbH; Wisconsin Alumni Research Foundation, Inc.; Warf Institute, Inc.; Raltech Scientific Services, Inc.; Ralston Purina Company; Eli Lilly and Company; and John L. Thompson and Sons and Company, Defendants.

All of the non-governmental defendants (# 4 above) settled with plaintiffs during trial and were not involved on the appeal to the Court of Appeals. Only parties ## 1-3 were, and still are, involved in this appeal.

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OCTOBER TERM, 1990.

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PETITION FOR A WRIT OF CERTIORARI.

Opinions Below.

The opinion of the Court of Appeals for the Second Circuit is printed in petitioner's appendix at pages A1-A45. It is reported at 924 F2d 1210 (1991).

The opinion of the District Court is printed in petitioner's appendix at pages A46-A389. It is reported at 724 F Supp 1421 (NDNY 1989). An earlier opinion of the District Court is printed in petitioner's appendix at A390-A398. It is reported at 593 F Supp 1336 (NDNY 1984).

Jurisdiction.

The mandate of the Court of Appeals for the Second Circuit was entered on March 12, 1991. The order denying NYSDOH's petition for rehearing was entered on March 4, 1991. The judgment of the Second Circuit was filed January 28, 1991.

This Court's jurisdiction is invoked under 28 USC §1254(1).

Although the court below directed a remand for calculation of the proper apportionment of settlement proceeds from private tortfeasors—a purely state-law question—no further action in the trial court will result in this case being more ripe for review at a later juncture. See, Stern & Gressman, *Supreme Court Practice* (6th ed., 1986), § 4.18, pp 224-226. The court below definitively resolved the federal statutory question under the Federal Tort Claims Act. Nothing that might occur on remand will enhance the ripeness of the federal question for review by this Court.

Statute Involved.

28 USC § 2680(a)

> "§ 2680. Exceptions
>
> The provisions of this chapter [28 USCS §§ 2671 et seq.] and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

Statement of the Case.[1]

Plaintiff, a research scientist employed by the New York State Department of Health ("NYSDOH"), tragically contracted rabies and suffered permanent brain damage as a result of exposure to a rabies virus provided by Dr. George Baer, a United States Government scientist employed by the Center for Disease Control ("CDC"), a Federal research facility. App, A3. The experiment was conducted by NYSDOH scientists on NYSDOH premises. App, A3, A9. The accident happened when aerosols, or airborne particles, of rabies virus leaked out of a machine being used to manipulate the virus in an attempt to convert it into a vaccine that could be used to prevent the spread of the disease of rabies in wildlife. App, A6-A7.

Government employee Baer had supplied the experimental virus at the request of State scientists. App, A9. As in other specific areas of scientific research, Government scientists at CDC specializing in rabies are frequently consulted by other scientists seeking information, advice and other forms of scientific collaboration. App, A9. NYSDOH scientists were attempting to develop a vaccine that would

[1]References to "App, A ____" refer to pages of the Appendix to this Petition. References to "Tr. ____" refer to pages of the trial transcript. References to "Exh ____" refer to trial exhibits. References to "J. App. ____" refer to pages of the Joint Appendix in the Court of Appeals.

be eaten by wildlife (e.g., foxes and raccoons), thereby immunizing the animals from the disease and preventing its spread. App, A7. There were numerous technical and practical difficulties encountered by the NYSDOH scientists, prompting them to consult with the Government experts at CDC. App, A9. Dr. Baer was the leading rabies expert at CDC and was known to NYSDOH scientists as the expert's expert. App, A7, A9. Accordingly, NYSDOH scientists informed Dr. Baer of their research objectives, theories, results and difficulties. App, A7, A9. They sought his help and advice in order to overcome problems in their experiment. App, A7, A9.

The basic elements of NYSDOH's research project can be concisely stated. App, A7. The purpose was to create a "vaccine", or modified "virus", which would be consumed—as "bait" or "food"—by wildlife, especially foxes who were a species peculiarly susceptible to rabies. App, A7. A virus is a microscopic organism which infects a host organism and multiplies in the host tissues. App, A3, A63. A vaccine is an artificial product usually developed from a virus. App, A7. The theory of vaccines in general, and this one in particular, was that a sufficiently "attenuated" or weakened virus could be administered to man or animal and would create antibodies so that the body's own immune system could resist a "challenge" by later exposure to the disease. App, A7.

The factual details of the experiment, and of rabies research generally, are not crucial to an understanding of the legal issue raised in this petition, namely, whether the errors or omissions of a Government scientist were protected by the discretionary function exception of the Federal Tort Claims Act ("FTCA"). Those factual matters are explored at great length in the opinions of both lower courts. App, A6-A14, A55-A58, A60-A157. In this Petition, we will focus on the findings of negligence—which

related to errors of risk assessment and failure to warn other sophisticated scientists that their research methods were unsafe—in an effort to show that the negligence of CDC's Dr. Baer was within the protection of the discretionary function exception.

Efforts by NYSDOH scientists using conventional laboratory techniques failed to yield a vaccine with enough potency, or titer. App, A9. Therefore, NYSDOH requested help from Dr. Baer at CDC. App, A9. Dr. Baer agreed to supply a more potent strain of rabies virus that he had used in his own experiments at CDC. App, A9-A10. With the understanding that NYSDOH would furnish to CDC some samples of the resulting vaccine product which NYSDOH scientists would produce, Dr. Baer managed to get CDC indirectly to subsidize NYSDOH's project by paying the cost of NYSDOH's rental of a machine used in the experiment. App, A8-A9.

For the experiment conducted by NYSDOH at a NYSDOH facility which ended in tragedy, NYSDOH scientists directed and controlled the use of this machine. App, A9. Unfortunately, the machine leaked and plaintiff became exposed to the viral material. App, A8. Neither the NYSDOH scientists, nor Dr. Baer—who was present solely in an observer status—actually knew or appreciated the magnitude of the risk. App, A12. Indeed, CDC's Dr. Baer himself stood a few feet away from the machine while it was in use during the project. App, A12.

Hindsight demonstrated that all of the scientists involved were negligent in not perceiving the risks of aerosol exposure to the experimental virus. App, A10-A11. This risk was not fully understood at the time. Every scientist present during this experiment, like any other professional potentially exposed to the rabies virus (e.g., veterinarians, postal delivery personnel), had been pre-vaccinated with the com-

mercial (Eli Lilly) rabies vaccine. App, A8, A11, A91. Every scientist present during this experiment had previously had their blood levels of rabies antibodies tested. App, A8. Every scientist present during this experiment had received positive confirmation that they had enough protection in their bloodstream to prevent the contraction of the rabies disease even if they came into contact with live rabies virus. App, A8. NYSDOH and CDC researchers all assumed that the rabies virus used in this project, even in high concentrations, was safer to use than the "street virus" in rabid animals which researchers frequently encountered, but for which no injury had ever occurred, presumably because they had been inoculated with the commercial vaccine. App, A8-A10.

At trial, it was found that NYSDOH scientists had operated an unsafe laboratory, in that they did not have available for use a number of devices that could have avoided aerosol exposure to the rabies virus. App, A11. Since plaintiff, because of his State employee status and receipt of workers' compensation benefits, was prohibited under State law from suing NYSDOH, the theory of liability at trial was that the Government was at fault as a joint tortfeasor. App, A6. The testimony from plaintiffs' experts was to the effect that research and safety conditions at the State laboratory were so bad that no research at this level of sophistication could safely have been conducted there. App, A8. The key findings of negligence against CDC's Dr. Baer related to his failure to halt a State-directed research project when Dr. Baer was merely an observer. App, A22. Alternatively, the courts below found that Dr. Baer should have warned the State scientists of the hazards of proceeding with the experiment. App, A22.

The risk that these scientists negligently failed to perceive related to the "route of transmission" of the rabies virus. App, A11. There are two principal methods of exposure: bloodstream or aerosol (airborne). App, A11.

For a typical case of exposure (for example, by dog bite), the rabies virus enters the body directly through the bloodstream. App, A11, A62. For that route of transmission, the commercial vaccine had always been effective. App, A11. Indeed, there had never, in the entire history of the commercial vaccine, been a single case of a scientist (or anyone else) contracting rabies when, as here, that person had previously been vaccinated with the commercial vaccine and blood tests had confirmed the level (titer) of blood antibodies. Tr. 1027-1028, 1421, 2224-2225.

In the case at bar, the route of transmission was not the typical bite route, but, rather by inhalation or aerosol exposure. App, A10-A11. As it turned out, this risk of exposure did not enjoy the protection of the commercial vaccine. App, A12. Unlike the typical case, the virus entered plaintiff's body by being inhaled, apparently traveling from the nerve endings in the nasal mucosa directly through the nervous system to the brain. App, A11. Thus, even though plaintiff had been immunized with the commercial vaccine, it was not effective in preventing contracture of rabies. App, A11. In effect, by bypassing the bloodstream, the rabies virus avoided the rabies antibodies produced by the commercial vaccine. App, A11.

Plaintiff at trial, bolstered by expert opinion testimony from risk-appraisal scientists, proved the negligence of Dr. Baer on the basis that he should have known of the risk of aerosol exposure. Tr. 985-987, 999-1000, 1003, 1030, 1086-1087, 1479-1483. Like other scientists who specialized in rabies research, Dr. Baer was certainly aware of the theoretical danger of aerosol exposure. Tr. 1038, 1176, 2138-2139. Indeed, Dr. Baer was the expert's expert in the field, having written countless articles, as well as having been editor in chief of the definitive two-volume scientific treatise on rabies. Tr. 111, 2330.

Dr. Baer believed, from years of his own research with the strain of rabies virus in question, that it was not dangerous to previously immunized scientists, since the virus had been used by scientists for years without human illness, despite accidental exposure to humans in laboratories. Tr. 1097, 1429-1430, 1786-1787. There was, of course, no conceivable way scientists could actually know the risk to humans, since scientific ethics forbid experiments on humans. Tr. 335, 645, 905-906. However, scientific data on species like foxes strongly suggested that this experimental strain of rabies virus was not dangerous. Tr. 1209, 1211, 2143-2148. The few adverse effects upon some animal species which had been documented in the scientific literature were discounted on factual or scientific grounds as not suggesting real risks for man. Tr. 1176, 2255, 2265-2266.

Likewise, Dr. Baer had scientific reasons for his belief that there was no significant risk to himself or anyone else from aerosol exposure to the virus he brought to the NYSDOH laboratory for the experiment in question. Tr. 2252, 2254, 2258-2259, 2312-2314. It is true that "cave workers" doing research in bat caves had, years earlier, contracted rabies. App, A94-A99. However, the levels of exposure were perceived to be much higher there, and, more critically, those cave workers had not been protected by immunization with the commercial vaccine. App, A94-A99; Tr. 1175, 2310. Thus, Dr. Baer believed that exposure to aerosols in a laboratory by scientists immunized with a commercial vaccine was not dangerous. Tr. 2252, 2254, 2258-2259, 2312-2314, 2322, 2324.

There was also one case in scientific history of a laboratory worker who contracted rabies. App, A99-A100.

A scientist in Texas who was mixing rabies materials in a blender contracted rabies after apparently inhaling aerosols

produced during the blending process. App, A100. However, two critical facts distinguished that case from this case. App, A99-A101. First, the virus there was the so-called "Challenge Virus Standard" ("CVS"), meaning the particularly lethal strain used as the benchmark virus to "challenge" or kill animals as a means of assaying the effectiveness of vaccines previously administered. App, A85-A86, A100. Moreover, while the victim of the blender incident had received pre-exposure vaccination some 13 years before the accident, he had not developed demonstrable blood antibodies. App, A100. Thus, it was as if he had never been immunized. App, A100-A101.

Therefore, on the basis of his knowledge and expertise, Dr. Baer discounted as insignificant, albeit mistakenly, the risk which theoretically existed with any exposure to rabies aerosols. Tr. 1032, 1173-1174, 1884, 1979-1980, 2313-2314. He exposed himself to aerosols in the NYSDOH laboratory, as did NYSDOH chief researcher Dr. Debbie and plaintiff. App, A12. Although we will never know for certain, it is believed that the reason only plaintiff contracted the disease is that he spent more time with the Uni-Glatt machine and was closer to the source of the leak in the machine. App, A12-A13.

With the benefit of hindsight, everyone recognizes that Dr. Baer miscalculated the risk to which he exposed himself, Dr. Debbie and plaintiff.

The district court held that the Government was liable in negligence for the errors and omissions of CDC's Dr. Baer. *Andrulonis v. United States,* 724 F Supp 1421 (NDNY 1989); App, A46 *et seq.* Because NYSDOH was a third-party defendant (having been impleaded by the Government), but not a party sued by plaintiff, the district court recognized that none of the negligence of NYSDOH scien-

tists could itself give rise to Government liability. 724 F Supp at 1472; App, A181. The court made a lengthy analysis of NYSDOH's negligence, 724 F Supp at 1472-1480; App, A181-A210, finding that NYSDOH scientists were sophisticated members of the "community of rabies experts" who were assumed to know the general theories and research concepts applicable to rabies work. 724 F Supp at 1474; App, A187. The court also found that NYSDOH scientists should have known the following: that pathogenicity of viruses could not be known for certain; that safe laboratory practice required researchers to assume that the experimental strain was dangerous to humans; that the concentration of a virus directly affects its pathogenicity; that aerosol exposure to viruses should be avoided; and that, despite its prior effectiveness, the commercial Eli Lilly vaccine (with which the scientists had been treated) could not guarantee safety against aerosol exposure to rabies virus. 724 F Supp at 1475-1476; App, A190-A195. The court also found that NYSDOH scientists also knew that the machine they were using was not airtight. 724 F Supp at 1476; App, A193.

From all of those facts, the district court found that NYSDOH scientists should have been able to anticipate that the experiment conducted on NYSDOH premises was unsafe. 724 F Supp at 1476-1477; App, A194-A198. The court found that NYSDOH (principally because of its chief rabies researcher, Dr. Debbie) was negligent in not making a proper "risk assessment" in connection with this experiment. 724 F Supp at 1477-1478; App, A198-A199. In particular, the court faulted NYSDOH for not following generally accepted laboratory practices to avoid exposure to aerosols. 724 F Supp at 1478; App, A199-A200. The court found that, without jeopardizing the efficacy of the experiment, NYSDOH could have enclosed the experimental apparatus in an airtight container to prevent aerosol exposure to the virus. 724 F Supp at 1478-1479; App,

A201-A202. On the basis of all of those findings, the district court held that NYSDOH was negligent, and that its negligence represented 65% of the causal negligence, with 30% attributed to the Government and the balance to private parties who settled. 724 F Supp at 1480, 1509; App, A208, A297.

The district court then explained its findings of negligence on the part of the Government. 724 F Supp at 1481-1496; App, A210-A256. The court focused on the theory of failure to warn. 724 F Supp at 1485-1493; App, A227-A249. On the basis that CDC's Dr. Baer was more knowledgeable about rabies than any of NYSDOH's scientists, the court found that Dr. Baer had a duty to make sure that NYSDOH's scientists were fully aware of all of the dangers associated with the use of this experimental virus. 724 F Supp at 1488-1489; App, A232-A236. The court placed particular emphasis on the fact that Dr. Baer was present in NYSDOH's laboratory while the experiment was being conducted. 724 F Supp at 1489; App, A235-A238. Therefore, since Dr. Baer saw that NYSDOH's laboratory was not equipped with safety equipment that would have minimized or averted aerosol exposure to the virus, the court held that a duty arose to warn NYSDOH scientists of the danger of continuing with the experiment. 724 F Supp at 1490; App, A238-A239. The court held that Dr. Baer, and hence CDC and the Government, could be found liable in negligence for not giving warnings in those circumstances. 724 F Supp at 1491-1493, 1495; App, A242-A248, A253-A254.

The district court, which had earlier denied the Government's motion to dismiss on the basis of the discretionary function exception, *Andrulonis v. United States,* 593 F Supp 1336 (NDNY 1984); App, A390-A398, gave very brief mention to the discretionary function exception. 724 F Supp at 1496-1498; App, A256-A264. The district court

heavily relied upon *Indian Towing Co. v. United States*, 350 US 61 (1955). *Andrulonis*, 724 F Supp at 1497; App, A259-A260. The court hinged its analysis on the planning/operational distinctions which the court understood *Indian Towing* to state as the measure of the discretionary function exception. 724 F Supp at 1497-1498; App, A259-A262.

The Court of Appeals affirmed the district court's decision in an opinion, *Andrulonis v. United States*, 924 F2d 1210 (2d Cir 1991); App, A1-A45, which, insofar as is relevant here, held that the discretionary function exception did not apply. 924 F2d at 1217-1220; App, A15-A23. The court applied what it understood to be a two-part test derived from *Berkovitz v. United States*, 486 US 531 (1988). *Andrulonis*, 924 F2d at 1218; App, A18-A19.

> "First, we must consider whether the conduct was a matter of choice for the acting employee, and if so, we must then determine whether the employee's actions involved public policy considerations." 924 F2d at 1218; App, A18.

The court acknowledged that there was no statute, regulation or any other directive which mandated what Dr. Baer should have done or which forbade him from what he did. 924 F2d at 1218; App, A19.

> "No such directive was applicable to Dr. Baer in this case; at the critical points in these events he had the power to choose his actions." 924 F2d at 1218; App, A19.

Thus, in the view of the Second Circuit, Dr. Baer's conduct was "discretionary" in the sense of not being circumscribed by regulations as in *Berkovitz*. *Andrulonis*, 924 F2d at 1218; App, A19.

> "But this does not end the inquiry. As we have noted, to qualify for the exception, Dr. Baer's critical choices had to involve policy considerations, and here they did not." 924 F2d at 1218; App, A19.

For its definitional or line-drawing aspect of the opinion, the Second Circuit relied upon what it understood to be the planning/operational dichotomy created in *Indian Towing* and subsequently evolved in Second Circuit cases. *Andrulonis*, 924 F2d at 1218-1219; App, A19-A20. The Second Circuit interpreted *Indian Towing* as holding that only the initial decision as to whether or not to install a lighthouse would be discretionary; in all other respects, there was no conceivable discretion and liability could be imposed for failure to "maintain" the lighthouse. 924 F2d at 1219; App, A20.

The court conceded that sometimes the execution of policy decisions might be protected by the discretionary function exception. 924 F2d at 1219; App, A21. The Second Circuit viewed those "execution" or "implementation" decisions as protected by the discretionary function exception only "when the steps in the execution process also require policy judgments". 924 F2d at 1219; App, A21. However, the court viewed this category of protected "execution" or "implementation" decisions very narrowly. 924 F2d at 1219; App, A21. Essentially, the court required proof of conscious, deliberate and explicit balancing of risks, benefits and costs; in the absence of such an evidentiary record, the Government would not be protected by the discretionary function exception. 924 F2d at 1219; App, A21.

Applying those principles to the case at bar, the Second Circuit held that the Government's decisions to encourage rabies research, to provide funding to NYSDOH and to furnish the virus were all protected "policy" decisions

within the scope of the discretionary function exception. 924 F2d at 1219; App, A22.

> "The same is not true, however, with Dr. Baer's alleged failure to warn of the extreme dangers presented by the particular circumstances of the March 29th experiment which Dr. Baer failed to interrupt. The situation simply did not lend itself to policy balancing, not [*sic*] is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed. Once he became aware of the risks, Dr. Baer was obligated to give warning. His is precisely the type of negligent omission for which congress waived the government's sovereign immunity in order to provide redress to citizens for the torts of government actors." 924 F2d at 1219; App, A22.

The court went on to reach other issues, including NYSDOH's argument on a purely State-law question with respect to the apportionment of the proceeds of plaintiffs' $1,300,000 in settlements with private tortfeasors. *Andrulonis,* 924 F2d at 1223-1226; App, A33-A41. The court reversed and remanded solely for purposes of recomputing the net judgment under the correct standards for allocating the proceeds of settlement. 924 F2d at 1226, 1227; App, A41, A45. In all other respects, the judgment was affirmed. 924 F2d at 1227; App, A45.

Reasons for Granting the Writ.

The Second Circuit's opinion conflicts with this Court's opinion in *Gaubert* in that it relies upon the discredited operational/planning distinction, as well as an unduly restrictive view of the discretionary function exception as applied to scientific evaluations of risk.

The Second Circuit's opinion preceded by two months this Court's opinion in *United States v. Gaubert,* 111 S Ct 1267, 113 L Ed 2d 335 (1991). The opinion below is in conflict with *Gaubert.*

In *Gaubert,* this Court refused to limit the protection of the discretionary function exception to the management or planning level of a Government agency. 111 S Ct at 1274-1275, 113 L Ed 2d at 348. Rather, day-to-day management of an agency's business, as well as management determinations of the broader contours of an agency's policy, were protected from tort liability under the discretionary function exception. 111 S Ct at 1275, 113 L Ed 2d at 348.

This Court held in *Gaubert* that not all "policy" in agencies is set in Washington by Commissioners, Secretaries or Cabinet-level executives. Rather, the very nature of effective governance, as well as the employment of experts with specialized expertise, requires that policy often be decided and implemented by persons lower in the agency hierarchy in whom responsibility is reposed. In *Gaubert,* Federal banking officials supervised certain aspects of a federally-insured savings and loan institution. All of the Federal supervision was undertaken with a view towards stabilizing a shaky savings and loan, to avert losses, protect depositors and to minimize the Government's exposure on deposit insurance guarantees. Thus, the Government role included the formulation of broader policy questions such as

replacement of existing management of the bank and recommendations for merger or acquisition of it by a stronger financial institution. However, the Government also became much more involved in the day-to-day activities of the bank after replacing prior management with Government appointees. Government employees recommended the hiring of certain consultants; advised the bank on whether, when, and how its subsidiaries should be placed into bankruptcy; mediated salary disputes; reviewed a draft of a complaint to be used in litigation; recommended change of status under State laws; intervened to prevent action by State regulators; and otherwise became involved in minute details of management of the bank.

The Court of Appeals for the Fifth Circuit believed that such Government involvement in the day-to-day workings of a bank took the case outside the scope of the discretionary function exception. The Court of Appeals in *Gaubert* relied on *Indian Towing Co. v. United States,* 350 US 61 (1955), in distinguishing between "policy decisions", which fell within the exception, and "operational actions", which did not. *United States v. Gaubert,* 885 F2d 1284, 1287 (5th Cir 1989). The Fifth Circuit reasoned that bank regulators had engaged in "operational" activities, and thus had "crossed the line established in *Indian Towing.*" 885 F2d at 1289.

This Court rejected the narrow and artificial distinctions drawn by the Fifth Circuit in *Gaubert.* This Court categorically stated that lower courts had, incorrectly, interpreted *Indian Towing* as having adopted "a nonexistent dichotomy between discretionary functions and operational activities". *Gaubert,* 111 S Ct at 1275, 113 L Ed 2d at 349.

The Fifth Circuit in *Gaubert,* as this Court held, had simply taken much too narrow a view of the meaning and scope of the discretionary function exception. The lower

court had failed to recognize that policy must be, and frequently is, set and implemented by experts within an agency to whom responsibility is delegated. This Court held that the availability of discretion in particular circumstances is presumed where agency employees are pursuing the general agency objectives, except where specific agency regulations or directives channel, forbid, or otherwise limit the exercise of discretion.

> "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and whether they are susceptible to policy analysis." 111 S Ct at 1274-1275, 113 L Ed 2d at 348.

Applying those criteria in *Gaubert*, this Court reversed the Fifth Circuit and found that all of the challenged acts of the federal employees involved the exercise of discretion in furtherance of public policy goals. 111 S Ct at 1279-1280, 113 L Ed 2d at 354.

In the case at bar, the Second Circuit made a similar error. Much as the Fifth Circuit had done in *Gaubert*, the Second Circuit relied heavily upon *Indian Towing* in formulating a distinction between protected and unprotected governmental conduct. *Andrulonis*, 924 F2d at 1219; App, A19-A20. While the Second Circuit did agree that the

broader contours of CDC's policy of cooperative research ventures with NYSDOH were protected by the discretionary function exception, 924 F2d at 1219; App, A22, it refused to treat implementation of that policy by Dr. Baer in the same way. The court held that Dr. Baer's awareness of risks took his conduct outside the scope of the discretionary function exception. 924 F2d at 1219; App, A22. The court asserted that because Dr. Baer did not interrupt or stop the NYSDOH project, his conduct was not protected by the discretionary function exception. 924 F2d at 1219; App, A22.

> "The situation simply did not lend itself to policy balancing, not [*sic*] is there any indication that Dr. Baer considered the policy implications or the pros and cons of allowing the experiment to proceed. Once he became aware of the risks, Dr. Baer was obligated to give warning. His is precisely the type of negligent omission for which congress waived the government's sovereign immunity in order to provide redress to citizens for the torts of government actors." 924 F2d at 1219; App, A22.

This analysis is at odds with the lessons of *Gaubert* for several reasons. To begin with, despite the fact that the Second Circuit found that *no* statute, *no* regulation and *no* agency directive dictated what Dr. Baer should have done, 924 F2d at 1218; App, A19, the court still held that his conduct was not discretionary. 924 F2d at 1219; App, A22. Indeed, CDC policy allowed CDC's scientists to share biological products (in CDC parlance, "etiologic agents") with public and private research laboratories. App, A9. This CDC policy allowed CDC to share such etiologic agents with any recognized health department that routinely worked with such agents. App, A9. The purpose was to facilitate research and experimentation. Moreover, because CDC neither had the resources nor staff for inves-

tigations, CDC's policy was not to investigate the competence of the receiving laboratory. App, A9; Tr. 1813-1815, 1954-1958, 1968-1969. The practice in the private sector was comparable, as Yale University likewise shared its etiologic agents without investigating the receiving laboratory. Tr. 1409-1412. Thus, the acts or omissions of Dr. Baer with respect to his assumptions of the competence of NYSDOH's researchers, as well as his failure to intervene in a NYSDOH-controlled experiment, could not possibly be non-discretionary under the *Gaubert* analysis. Dr. Baer clearly was empowered to share etiologic agents and as chief of viral zoonosis research at CDC he unquestionably had broad discretion as to how best to implement CDC's policies of sharing etiologic agents for research purposes. App, A19; Tr. 1812-1813, 1959-1963.

Moreover, there simply was no recognition by the Second Circuit that policy is set and implemented by various persons, at various levels of government, and at various levels of detail and in various levels of complexity of fact and judgment. Judgment by scientists, based upon their experience and knowledge in a specialized area, is just as much discretionary as judgment by bankers in their specialized area.

One can readily understand that the magnitude of the tragedy to plaintiff in the case at bar skewed the thinking of the court below, as it tried to avoid dismissing the claim on the basis of the discretionary function exception. But the implications of the Second Circuit's analysis are much broader and far more sweeping than just this case. The nature of the inquiry and the scope of potential Government liability is present in every case of collaborative scientific inquiry. Current research on a cure for Acquired Immune Deficiency Syndrome (AIDS) is just one example. Under the analysis of the Second Circuit, Government scientists who share research ideas, viral or tissue samples or

practically anything else conceivably used by scientists, may be creating tort liability for the Government which the discretionary function exception would not insulate from liability.

Petitioner wishes to underscore the fact that the nature of plaintiff's claim, as well as the holdings of the courts below, hinge upon an alleged duty of one scientist (employed by the Government) to take action in the research laboratory of another scientist (here, Dr. Debbie of NYSDOH) and attempt to halt a project being conducted by an experienced, sophisticated researcher (Dr. Debbie) in his own (NYSDOH) research laboratory. While it is true that if Dr. Baer were himself running his project in his own (CDC) laboratory, he might have been expected to use safety devices to prevent aerosol exposure (*see*, CDC Lab Safety Manual; Exh G-136; J. App. at 9243-9445), the safety precautions in that CDC booklet applied only to CDC facilities. There simply was no CDC policy, regulation or practice requiring bystanders in someone else's research laboratory to intervene or to warn another knowledgeable scientist about how he should run his experiment. App, A19.

The Second Circuit also failed to understand that "risk assessment" is a core value implicit in the meaning of the discretionary function exception. With the benefit of hindsight, and particularly when parsing minute details of any particular governmental endeavor, it is always possible to demonstrate that a risk was not fully appreciated. But, one of the main teachings of *Dalehite v. United States*, 346 US 15, 27-28 (1953), is that the protection of the discretionary function exception does not disappear merely because the scope of the risk was not fully appreciated. Otherwise, the exception means very little and liability is simply gauged by an ordinary measure of negligence.

Therefore, simply on the basis of the conflict with *Gaubert,* as well as the misinterpretation of *Indian Towing* and *Dalehite,* the Second Circuit's analysis should be reviewed by this Court.[2]

Additionally, there is enough conflict and tension in earlier rulings on similar issues in the Courts of Appeals as to warrant certiorari on that basis as well. The conflict in decisional law is most evident in the cases dealing with scientific judgment generally and risk-assessment in particular. These cases include radiation-related injuries from nuclear testing, the handling and disposal of toxic substances, as well as the selection of appropriate safety equipment and procedures for dangerous substances. The cases from other circuits have applied the discretionary function exception to errors in judgment by scientists and technicians with respect to their conscious and inadvertent risk-assessment decisions. These cases stand in conflict with the Second Circuit's analysis in the case at bar.

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[2]The Second Circuit held that the "clearly erroneous" standard of review applied to all aspects of the case, including the district court's evaluation of the discretionary function exception. *Andrulonis,* 924 F2d at 1214, 1220; App. A6, A23. This is in conflict with other circuits which apply a "de novo" standard of review. *Weiss v. United States,* 889 F2d 937, 938 (10th Cir 1989); *McMichael v. United States,* 856 F2d 1026, 1031 (8th Cir 1988); *Starrett v. United States,* 847 F2d 539, 541 (9th Cir 1988); *Mitchell v. United States,* 787 F2d 466, 468 (9th Cir 1986); *Merklin v. United States,* 788 F2d 172, 174 (3d Cir 1986); *Hart v. United States,* 894 F2d 1539 (11th Cir 1990). While it is true that purely or largely factual questions in an FTCA case are subject to "clearly erroneous" review, the ultimate legal conclusions are not; rather, the conclusions of law, even when mixed with factual questions, must be reviewed de novo. *Henderson v. United States,* 846 F2d 1233 (9th Cir 1988); *LaBarge v. Mariposa County,* 798 F2d 364 (9th Cir 1986), *cert. denied sub nom. County of Mariposa v. United States,* 481 US 1014 (1987); *Millang v. United States,* 817 F2d 533 (9th Cir 1987), *cert. denied,* 485 US 987 (1988); *Begay v. United States,* 768 F2d 1059, 1062 (9th Cir 1985).

In *Allen v. United States,* 816 F2d 1417 (10th Cir 1987), *revg,* 588 F Supp 247 (D Utah 1984), scientists in the 1950s conducted open-air atomic bomb tests in Nevada. 816 F2d at 1418. While the general framework of the testing program was the subject of detailed plans, the execution thereof was not similarly confined by written plans and procedures. 816 F2d at 1419. The district court concluded that the nature of the decisionmaking (scientific judgments of risk assessments) and the hierarchy of the decisionmakers (low-level delegees in the chain of command) took the case outside the scope of the discretionary function exception. 588 F Supp at 338-340. The Tenth Circuit, reversing the lower court, held that all of the challenged actions surrounding the planning, operations and day-to-day activities of the open-air testing program were protected from liability on the basis of the discretionary function exception. 816 F2d at 1424.

The Ninth Circuit came to a similar conclusion in another case involving personal injury and wrongful death claims by military and civilian participants in the atmospheric nuclear weapons testing program. *In re Consolidated U.S. Atmospheric Testing Litigation,* 616 F Supp 759 (ND Cal 1985), *affd,* 820 F2d 982 (9th Cir 1987), *cert. denied sub nom. Konizeski v. Livermore Labs,* 485 US 905 (1988).

Other courts of appeals have come to similar conclusions in cases where it was alleged that safety procedures for the handling of dangerous substances either were not in effect or were not followed. In *Totten v. United States,* 806 F2d 698 (6th Cir 1986), an employee of a manufacturer of Air Force missile was killed during clean-up of hazardous solid rocket fuel after a missile test failure. 806 F2d at 699. In the summary judgment posture of that case, it was assumed that plaintiff could prove that the United States—which had reserved the right to oversee and to inspect the military

contractor's work—was guilty of negligence in [1] failing to comply with a Department of Defense "Military Standard" requiring the use of non-static clothing; [2] failing to comply with a like requirement for non-sparking tools; and [3] failing to have fire-fighting equipment standing ready at the site. 806 F2d at 699-700. The Court of Appeals upheld the dismissal of the complaint on the basis of the discretionary function defense and the reasoning in *Dalehite.* 806 F2d at 700-702. Similarly, in *U.S. Fidelity & Guar. Co. v. United States,* 837 F2d 116 (3d Cir), cert. denied, 487 US 1235 (1988), the proof at trial (which resulted in a verdict for plaintiff) demonstrated negligent risk assessment. The claim was still dismissed, on the basis of the discretionary function defense, because the decisions were judgmental and discretionary, albeit erroneously made. 837 F2d at 122.

Moreover, decisions by the Ninth and Tenth Circuits have held that the failure of the Surgeon General, the Public Health Service and their employees to disclose known health risks to uranium workers constituted discretionary or judgmental decisions protected by the discretionary function exception. *Begay v. United States,* 768 F2d 1059, 1064-1066 (9th Cir 1985), cert. denied, 485 US 935 (1988); *Barnson v. United States,* 816 F2d 549, 553-557 (10th Cir), *cert. denied,* 484 US 896 (1987).

Additionally, a number of other courts have emphatically rejected the Second Circuit's approach of conditioning discretionary function immunity on proof by the Government that its employee vested with discretion actually engaged in a conscious, deliberate "balancing" of risks. *Andrulonis,* 924 F2d at 1219; App, A22. The weight of authority is to the contrary. *Myslakowski v. United States,* 806 F2d 94, 97-98 (6th Cir 1986); *Sea-Land Services, Inc. v. United States,* 919 F2d 888, 892 (3d Cir 1990); *Kennewick v. United States,* 880 F2d 1018, 1028 (9th Cir 1989).

CONCLUSION

This court should grant a writ of certiorari. This court should either vacate the decision below and remand for reconsideration in light of *Gaubert* or should grant plenary consideration.

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